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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 728

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, CARRIERS EQUIPMENT COMPANY, HAYDEN TRUCK LINES, INC., *Appellants,*

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO, *Appellee*

JURISDICTIONAL STATEMENT

This appeal is taken pursuant to the provisions of paragraph (a) of Section 237 of the Judicial Code. 28 U. S. C., 344.

The appeal involves the validity of statutes of the State of Ohio as construed by the Board of Tax Appeals of the State of Ohio and affirmed by the Supreme Court of Ohio, Section 5546-2, General Code, of Ohio, levies a sales tax upon retail sales of tangible personal property in Ohio, and provides:

> "It shall be presumed that all sales made in this State are subject to the tax hereby levied, until the contrary is established."

Section 5546-1 excepts from sales tax those sales in which the purpose of the consumer is to use the property:

"directly in the rendition of a public utility service."

Section 5546-2 further provides that the tax does not apply to:

"8. Sales which are not within the taxing power of this State under the Constitution of the United States.

"Nothing in this act shall be so construed as to impose any tax on the transportation of persons or property."

Section 5546-26, General Code of Ohio, levies a use tax upon all tangible personal property purchased on and after January 1, 1936, for storage, use, or other consumption in Ohio. The section further provides:

"It shall be presumed that tangible personal property purchased on or after January 1, 1936, by any person for delivery in this State is purchased for storage, use, or other consumption in this State."

Section 5546-25, General Code of Ohio, excepts from the use tax any sale where the purpose of the consumer is to use the property:

"directly in the rendition of a public utility service."

Section 5546-26, further provides that the use tax does not apply to:

"Property, the storage, use, or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States, or under the Constitution of this State."

The State of Ohio assessed sales and use tax upon sales of tangible personal property, all of which was used by the appellants exclusively in the transportation of property in

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interstate commerce by common carriers and directly in the rendition of a public utility service.

This appeal is from the judgment of the Supreme Court of Ohio entered December 8, 1948, and which judgment became final on January 6, 1949, when the Supreme Court denied the appellants' applications for rehearings.

The application for appeal is presented on the 7th day of March, 1949.

Statement of the Case

The tax department of the State of Ohio made an audit embracing the period from January 1, 1939, to December 31, 1943. Upon the basis of this audit, all four appellants, each of which is a separate corporate entity, were *jointly* assessed sales tax and use tax. The sales tax with penalty aggregated $22,059.39. The sales tax was assessed with respect to tractors, amounting to tax and penalty of $11,671.31 (R. 64-68), tires and tubes (amounting to $10,999.29, R. 72), parts (amounting to $5,232.07, R. 73) and smaller items listed as oil and grease, safety gas tanks, garage equipment, executive expense, capital equipment investment, bunkhouse expense, automobiles and supplies.

The use tax was assessed with respect to tractors (amounting to $2,976.22, R. 70, 71, 90), trailers (amounting to $15,705.38, R. 17, 90, 116), tires and tubes and smaller items of supplies.

The assessment was protested by the appellants and on March 27, 1946, the Tax Commissioner gave notice of final assessment, eliminating the sum of $1326.68. Appeal was taken to the Board of Tax Appeals of the State of Ohio. Testimony was taken and the final order of the Board of Tax Appeals was entered September 25, 1947. The Board of Tax Appeals found that all purchases and sales of tractors and trailers, after November 5, 1940, were used directly in

the rendition of a public utility service and were therefore exempt. As to all other items, the assessment was affirmed. Appeal was taken to the Supreme Court of Ohio, which affirmed the decision of the Board of Tax Appeals.

Facts of Appellant's Operations

An aggregate assessment was made against all four companies for the alleged reason that it was "a physical impossibility to segregate the audit" and apportion the tax claimed to be due from each of the companies named. This was incorrect (R. 21, and see Appendix "B"). The Tax Commissioner failed to follow the audit (R., 95, 96, 99, 105). And the Board of Tax Appeals erred in following the same logic (R. 202).

A brief resume of the facts is as follows:

Midwest Haulers, Inc., is an Ohio corporation organized September 29, 1931, and thereupon certificated as an interstate common carrier (public utility) operating through 15 states (R. 20) and was such during the entire term of the audit (R. 17). It was placed in receivership December 4, 1940, and the receivership continued during the balance of the term of the audit (R. 8, 17, 19, 20, 23).

Mutual Trucking Company was incorporated under the laws of the State of Illinois, and was certificated by the Public Utilities Commission of that state as a common carrier (public utility); also, by the State of Ohio as a common carrier (R. 58). It was so certificated as an interstate operator (R. 9, 19) during the entire period of the audit (R. 9, 19, 23, 24, 45, 46, 47, 48, 58, 135).

Both Midwest and Mutual were exclusively interstate operators throughout territory comprising 15 states (R. 9, 19, 20, 23, 24, 58). They operated under tariffs and concurrences, not contracts (R. 167, 135, 138, Ex. "Z", p. 147). They in 1936 applied for (R. 52) and were granted the rights

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of common carriers under the Motor Carrier Act of Congress (R. 41, 133). Neither company was engaged in intrastate operations (R. 17, 24).

Midwest, since incorporation, and Mutual, since July, 1936, operated, as to engaging equipment for doing the actual transportation of the freight entrusted to it, under the independent contractor system (R., 10, 11, 14, 58, 59, Ex. 1, p. 11), which system is authorized under the Motor Carrier Act of Congress 49 U. S. C., Section 303 (19). It engaged owners of suitable motor equipment who contracted to do the necessary transportation service on a predetermined mileage basis schedule, furnishing all labor necessary to accomplish the result.

See:

Midwest Haulers v. *Brady*, 128 F. (2d), 496;
U. S. vs. *Mutual Trucking Co.*, 141 F. (2d) 655;
Harrison, Collector, vs. *Greyvan Lines, Inc.*, Sup. Ct. L. Ed. Adv. Ops., Vol. 91, p. 1335, aff'd 156 F. (2d), 412; 91 Law Ed., 1787;
Commercial Motor Freight, Inc. v. *Ebright*, 143 O. S., 127.

The routes of Midwest and Mutual, while in part duplicating, were not identical. The combined operations of the two companies covered fifteen states, starting at Minneapolis and St. Louis in the one direction and Boston, Newark and Philadelphia in the other, and covering intermediate points. (R., 20.) Mutual operated exclusively from Chicago to Minneapolis and Milwaukee, whereas Midwest covered certain eastern states not reached by Mutual. (R., 20, 58.)

Before November 5, 1940, the companies operated exclusively on the independent contractor basis. (R., 10.) However, the economic conditions attending the approach

of the world war, including the Lease-lend Act of Congress, and scarcity of man-power and equipment forced a modification commencing November 5, 1940. (R., 11, 85 et seq.)

Prior to November 5, 1940, some of the owners-operators enticed by offers of excessive prices equalling the original cost of their investment, sold their motor vehicle equipment previously in use in Midwest and Mutual service. (R., 59, 60, 61.) Others were enticed away by better offers made by competitors. (R., 12, 13, 14.) In addition there was increased freight which had to be transported. Prior to November 5, 1940, during the entire previous period involved in the audit, T. G. Hayden, as an individual, operated, as an independent contractor, many pieces of motor vehicle equipment for Mutual Trucking Company. (R., 13). He was the largest independent contractor in the service. He had purchased much equipment and had an established credit rating. Hayden was a resident of Illinois and operated from the city of Chicago. (R., 13, 60-62.)

Because of the conditions just described and the necessity of immediate action, arrangements were made with T. G. Hayden to immediately increase his operations by the purchase of additional equipment with funds furnished by Mutual, and on a modification of arrangements. (R., 60, 61, 85 et seq.) Hayden continued to operate as an independent contractor, the equipment owned by him; and in addition agreed to and did manage the additional equipment bought with Mutual's funds, and hired and fired the additional drivers and other employees necessary to the operation, paid with Mutual's funds all wages, social security and unemployment taxes incurred, the licensing of the equipment, necessary repairs and maintenance. As to such equipment Mutual reimbursed Hayden for all outlays, in-

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cluding cash down-payments required, and paid him $5.00 per tractor per month for truck supervision in that connection. (R., 87). As to these transactions, Mutual set up an account on its books, known as "T. G. Hayden, Special Account." (R., 11, 36, 60, 61, 62). This arrangement continued to January 1, 1942. In the interim, Hayden had requested a change because of the increasing financial obligations being incurred by him, and the uncertain conditions of operation in war time. (R., 35.) In the interim Hayden continued to operate his own trucks on an independent contract basis. (R., 12, 60, 61.)

January 1, 1942, Hayden Truck Lines, Inc., was incorporated (R., 36) and said corporation thereupon took over the equipment so purchased with Mutual funds and operated by T. G. Hayden on the "T. G. Hayden, Special Account." Hayden was elected president of the company and managed the company until he resigned on March 30, 1942. Hayden Truck Lines, Inc., with respect to the additional equipment only, assumed the same relationship as "T. G. Hayden, Special Account" to Mutual Trucking Company. (R., 36.) During the balance of the period of the audit Hayden Truck Lines continued hauling solely in interstate movements. (R., 48.) It had no salaried officers.

Carriers Equipment Company was organized in Ohio, April 13, 1939, for the purpose of holding and advantageously purchasing equipment. (R., 12, 15.) The individual then operating, or intending to operate, as an independent contractor could not purchase equipment. (R., 12, 13.) Pressure, or buying power, was required to get it (R., 12, 13). Carriers had a capital of $500.00. (R., 9.) It had no salaried officers. All its obligations were discharged by Mutual. (R., 63.) Carriers was organized with limited capital as a holding company, a situation for which there is

much precedent among common carriers (R., 63), even with the railroads. (R., 12, 38, 39, 51.) Equipment was furnished by Carriers on a lease or rental basis. (R., 15, 177.)

No trailer equipment was purchased by Carriers but after purchase, however, all trailer equipment purchased was set up on Carriers' books. (R., 51, 63.) Most of this equipment was purchased on small down payments with the balance due in monthly installments. A rental charge was set up on Carriers' books in the amount necessary to liquidate the deferred installments and rental was charged for use of such equipment. (R., 25, 63, 177). No profit has been made on Carriers' operations. The plan provided a practical way in which to liquidate the deferred installments. This was a matter of convenience for keeping all such equipment records in one account.

Midwest did not participate in the purchase of over-the-road equipment and materials used in the garages. (R., 25, 51, 177.)

No certificate of title is required in Ohio for the semi-trailers. However, Illinois law required a bill of sale to be presented to the secretary of state before a license to operate the trailer would be granted. Moreover, Illinois law licensed the tractor and semi-trailer as a unit, and not separately (as in Ohio) (R., 175, 176) and so, in order to get a license in Illinois where all of Mutual's equipment was required to be licensed, it was necessary there to have the bill of sale made out to the same person who owned the tractor. So at most, the carrying of the trailers on the books of Carriers was a mere bookkeeping transaction. (R., 63.)

All tractor equipment purchased was transferred to Carriers Equipment account and this was done solely for the purpose of following the one plan with reference to liqui-

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dating the balance due both on the tractors and on the trailers. Also evidencing the bookkeeping character of the arrangement, the legal title to the tractors as evidenced by certificate of title was not in Carriers Equipment. (R., 63.)

Where Federal Questions Were Raised

The only *court* which has considered this cause is the Supreme Court of Ohio. All other proceedings were before the administrative tribunals of the tax department. There are no pleadings before these boards. When appeal was taken from the ruling of the Board of Tax Appeals to the Supreme Court of Ohio, the appellants' assignment of errors included the following:

> "10. In failing to find that the property so purchased and sold was used in interstate commerce and was not within the taxing power of the state of Ohio under the Constitution of the United States.
>
> "11. In applying the provisions of Section 5546-2, providing that
>
> > 'It shall be presumed that all sales made in this state are subject to the tax hereby levied, until the contrary is established.'
>
> whereby, in so doing, notwithstanding evidence to the contrary, the Tax Commissioner and the Board of Tax Appeals denied to the appellants, and each of them, the constitutional rights guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.
>
> "12. In applying the provisions of Section 5546-26, providing that
>
> > 'It shall be presumed that tangible personal property purchased on or after January 1, 1936, by any person for delivery in this state is purchased for storage, use or other consumption in this state.'

whereby, in so doing, notwithstanding evidence to the contrary, the Tax Commissioner and the Board of Tax Appeals denied to the appellants, and each of them, the constitutional rights guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

"13. The aforesaid quoted portions of Sections 5546-2 and 5546-26 are in contravention of the Fourteenth Amendment to the Constitution of the United States, and void."

The Supreme Court considered only the 10th assignment. The Court held that the taxes were valid because levied without discrimination against interstate and intrastate commerce. The Court says:

"Only such sales as are made within the state are taxed, and not those sales outside its borders." (Op. 405)

This statement is irreconcilable with the specific findings of the Board of Tax Appeals with respect to the use tax assessment:

"$258.95 was assessed on *out of state* purchases"

• • • • • • •

"$18,923.13 was assessed on *out of state* purchases of tractors and trailers" (R., 195).

The decision of the Board of Tax Appeals, affirmed by the Supreme Court of Ohio, with respect to the period prior to November 5, 1940, was based on their conclusion that prior to that date the appellants, Midwest Haulers, Inc., and Mutual Trucking Company, were "contract haulers." (R. 198.) Not only was there no evidence to support such a finding but all the evidence was contrary to that finding. Both Midwest Haulers, Inc. and Mutual Trucking Company were operating at all times as common carriers under certifi-

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cates of public convenience and necessity granted them by the Public Utilities Commission of Ohio. (Stipulation, R. 9.) Certificate of convenience and necessity was granted by the Interstate Commerce Commission to Midwest Haulers, Inc. on condition that the operations of the two companies be combined. They were found to have been engaging in interstate commerce as common carriers *continuously since June 1, 1935* (R., 133, 134). The uncontradicted evidence shows that they did actually operate as common carriers:

> "The great volume of freight was offered to us by Universal, of course, but we always took freight wherever it was offered in conformity with the tariffs on file. We had to do it, as a public utility." (R., 47.)

The reference to "Universal" meant the Universal Carloading & Distributing Company, which, as disclosed by the evidence, is a "freight forwarder" (R., 164) and as such is regulated by Congress, Title 49, U. S. C., Section 1001 et seq., being Part IV of the Interstate Commerce Act. It is a common carrier.

The uncontradicted evidence to the contrary, notwithstanding, the Board of Tax Appeals applying the presumption of the statutes found that prior to November 5, 1940, Midwest Haulers, Inc. and Mutual Trucking Company were not common carriers and rendering a public utility service, but were "contract carriers."

Likewise, with respect to the assessments on sales of tires and tubes, oil and grease, parts and other essential items to a transportation business, the Board of Tax Appeals and the Supreme Court of Ohio ignored the evidence and common knowledge that all such items are *indispensable* to the services of a common carrier, and held sales of such property taxable, as not being used directly in rendering a public utility service.

The reasoning and basis of the finding of the Board of Tax Appeals is demonstrated by this language from its decision:

> "Concerning this assessment of $18,260.86 made on small items purchased by Mutual and Midwest and thereafter sold to their contract haulers in Ohio, it is concluded that Mutual and Midwest were duty bound to have collected sales tax from them for and on behalf, of the state. Due to insufficient record evidence, it must be presumed that these sales occurred within the state. Mere denial and assertion that a majority of these sales occurred without Ohio, without the offering of proof contra, is insufficient to counter-balance or overcome the statutory presumption which attends the action of the taxing authorities in making such assessment. No proof is made that such a tax has been paid elsewhere or that this or that sale was made outside of Ohio." (R., 198.)

The record shows without contradiction that the only purchases made by Midwest Haulers, Inc. consisted of three pickup trucks. (R., 25.) On and after December 4, 1940, Midwest Haulers, Inc. was in the hands of a receiver. Notwithstanding these facts, the joint assessment against all four appellants was permitted to stand. *The receiver for Midwest is not a party to this action.* But under the judgment as it stands, Midwest Haulers, Inc. is jointly liable for the entire amount of the assessment.

Contrary to Commerce Clause

The taxes assessed by the State of Ohio are violative of the commerce clause of the constitution. As stated in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; 82 L. Ed. 823:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce *burdens of such a nature as to be capable of being*

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imposed • • • with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." (255-256)

If the state of Ohio may lawfully assert these taxes against the appellants, then any or all of the other fourteen states in which Midwest Haulers, Inc. and Mutual Trucking Company operate as common carriers may also assess similar taxes.

McCarroll v. *Dixie Greyhound Lines, Inc.*, 309 U. S., 176, 84 L. Ed. 683.

Helson v. *Kentucky*, 279 U. S. 275, 73 L. Ed., 928.

Sault Saint Marie v. *International Transit Co.*, 234 U. S. 334.

Carson Petroleum Company v. *Vial*, 279 U. S. 95, 73 L. Ed., 626.

The tax imposed by the State of Ohio is directly upon the instrumentalities used in interstate commerce. The property was not purchased for "storage, use or other consumption *in this state*" but for use in the transportation of interstate commerce in many states.

Denial of Due Process

The judgment is contrary to the indisputed facts. The tax examiners simply assumed that the sales were taxable. (R. 100, 101, 104). The State of Ohio may not collect a tax on the basis of a presumption which is dispelled by the evidence. The *ipsi dixit* of the Tax Commissioner cannot supply the place of evidence. The judgment in this cause falls under the same condemnation as that in the case of *Ohio Bell Telephone Company* v. *Public Utilities Commis-*

sion of Ohio, 301 U. S. 292; 81 L. Ed. 1093, wherein the court says:

> "• • • The commission, withholding from the record the evidential facts which it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms. (p. 1101.) • • • In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely; how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the commission were supported by the evidence when the evidence that it approved was unknown and unknowable? • • • What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in adequate sense, unless the evidence can be known.'" (p. 1101.) • • • All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard • • • of a fair and open hearing be maintained in its integrity. • • • The right to such a hearing is one of 'the rudiments of fair play' • • • assured to every litigant by the Fourteenth Amendment as a minimal requirement. • • •" (p. 1102.)

Similarly in *Interstate Commerce Commission* v. *Louisville & Nashville Rd. Co.*, 227 U. S. 88:

> "The lack of formal proof at the hearing essential to sustain an order of the Interstate Commerce Commission reducing rates cannot be supplied by indulging

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> a presumption that its findings were supported by the information which the commissioner is required to obtain in order to enable it to perform the duties and carry out the objects for which it was created."

Likewise, as stated in *American Eagle Fire Insurance Co.*, v. *Jordan*, 67 F. Supp., 76:

> "There must be due notice and an opportunity to be heard, *the procedure must be consistent with the essentials of a fair trial, and the commission must act upon evidence and not arbitrarily.*" (p. 81.)

To grant a hearing to a litigant and thereafter to ignore the undisputed evidence amounts to the same thing as denying the right to a hearing.

As stated in *Foster* v. *State of Illinois*, 332 U. S., 134, 67 S. Ct., 1716, 91 L. Ed., 1955:

> "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice, . . . It is not satisfied by merely formal procedural corrections. . . . (Op. 138).

Copies of the decisions of the Board of Tax Appeals and the Supreme Court of Ohio are attached hereto.

The record in this cause involves substantial Federal questions. In order that the appellants' fundamental rights of due process of law may be protected and the question of the invasion of the commerce clause of the Constitution of the United States may be reviewed, we respectfully submit that the appellants are entitled to be heard on appeal by the Supreme Court of the United States.

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APPENDIX "A"

BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION OF OHIO

No. 11516 Entry

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, Carriers Equipment Company, Hayden Truck Lines, Inc., *Appellants*,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio, *Appellee*.

This is an appeal by the four appellants separately and severally complaining of a final order of assessment and penalty entered by the Tax Commissioner on March 27, 1946. The matter came on to be heard upon the evidence contained in the records made before the Board and the Board's examiner, the agreed fact stipulation, the transcript, the briefs of counsel. The period covered by this audit is from January 1, 1939, to December 31, 1943. The assessment has to do with both sales and use tax transactions embraced within that period. The amounts therein found and determined are as follows:

	Assessment	*Penalty*	*Total*
Sales	$29,298.51	$4,394.77	$33,693.28
Use	19,182.08	2,877.31	22,059.39
Total sales and use taxes			$55,732.67

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For convenience in discussing this appeal, the tax assessments can be broken down briefly described as follows:

Sales Tax

$10,148.97	(Tractors and trailers purchased between November 5, 1940, and December 31, 1941.)
477.51	(3 pickup trucks and 7 passenger automobiles.)
411.17	(Oil, parts and drivers' log books purchased by Hayden drivers.)
18,260.86	(Tires, tubes, parts, oil, grease, etc. purchased by Mutual and Midwest and sold to their independent contractor haulers.)
$29,298.51	Sales tax assessment.
4,394.77	Penalty.
$33,693.28	Total sales tax assessment and penalty.

Use Tax

$18,923.13	(Tractors and trailers purchased outside of Ohio.)
258.95	(Fire extinguishers, garage items, safety buttons, pencils, dictaphones, etc. purchased outside of Ohio.)
$19,182.08	Use tax assessment.
2,877.31	Penalty.
$22,059.39	Total use tax assessment and penalty.

This tax was not assessed proportionately, but was assessed *in toto* against all four appellants. Among other matters, the Tax Commissioner found that Mutual and Midwest were contract carriers of Universal Carloading Company and that these two appellants were not rendering a public utility service and, hence, were amenable to sales taxation on the purchase price of several hundred trailers and tractors.

How the Tax Commissioner, in view of the record evidence, arrived at this conclusion is only explainable by the

labyrinth created by the business sagacity and acumen of those who governed the policies of the four appellants, the facts that audits were made only from invoices, the unity of purpose sought to be accomplished, the admitted fact by Mutual and Midwest that they were contract carriers prior to November 5, 1940, and the mass of figures and facts that are to be encountered. A recitation of all the facts would serve no useful purpose. Such as are necessary to display the true picture, as this Board views it, will be set forth.

Mutual, an Illinois corporation, and Midwest, an Ohio corporation, were both conceived in 1931. Prior to November 5, 1940, both operated exclusively on an independent contractor's basis. Due to war conditions then arising, many contract haulers were selling their privately owned trucks and trailers at enhanced prices. During the period of audit in question these companies lost 310 tractors by independent contractor sales. To rectify this loss, a circuitous course was pursued by Mutual and Midwest. Both ceased to operate as contract carriers and applied for and procured authority from the Federal and two state authorities to operate as common carriers of freight in interstate commerce. To that end they were so licensed, granted certificates of necessity by the respective commissions, filed all tariffs and concurrences, and did and performed all things necessary. Their second business policy, in order to keep their contract carriers from becoming alarmed, to avoid labor trouble and for other business reasons, was to acquire equipment to offset their past and future loss of contract haulers by acquiring trucks and trailers with which they might maintain their expanding business. To do so without knowledge of their remaining contract haulers, Mutual and Midwest officials, working in harmony, caused Carriers Equipment Company, to be organized under Ohio law on April 13, 1939. This appellant, with a capital of but $500.00, was holding company, which made no effort to qualify as a common carrier. Shortly after its incorporation, it purchased 50 trailers at the instigation of Mutual and Midwest and thereafter purchased other equipment for Mutual and Midwest. Mutual paid all of its obligations. Carriers, however, was a convenient vehicle through which to make payment on

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deferred purchase installments, to charge off depreciations and to conceal the real ownership.

To digress for the moment, Mutual and Midwest, prior to November 5, 1940, operated as contract haulers for Universal Carloading and Distributing Company, a freight forwarding company, which at one time during the year 1938, operated 107 loading docks in the United States. It owned, controlled and operated pickup and delivery trucks at these points and assembled, made up and sealed car or truck load shipments of freight consigned by the public generally to distant points. Per example, Columbus and vicinity shipments were carried in Columbus, drawn to Chicago, there unloaded at its docks and there sorted, re-carred and forwarded in carload lots to various western points. Mutual and Midwest at no time owned and operated docks. Such freight moved under Universal bills of lading. Mutual and Midwest never owned or operated docks anywhere. Universal is the freight forwarding subsidiary of U. S. Freight Company, which owns and operates numerous subsidiaries and much rolling stock. U. S. Freight is a common carrier engaged in handling freight interstate for the public generally. After November 5, 1940, when Mutual and Midwest had qualified to engage in interstate commerce, they entered into concurrences with Universal and divided the freight receipts collected by Universal on a percentage basis dependent, of course, on the proportion of haulage. Where concurrences ended, tariffs were followed. The proof discloses that prior to and after November of 1940, 90% of the freight hauled by Mutual and Midwest was collected and delivered at points of origin and delivery by Universal. The remaining 10% hauled by these two appellants was business they had secured from producers, and which was consigned and delivered to them at the consignor's factory or point of origin and delivered in car load lots on their bills of lading to points of delivery.

To resume, T. G. Hayden, of Chicago, an extensive contract hauler, prior to and after November, 1940, drew freight for Mutual and Midwest on a tonnage or mileage basis. Hayden's credit standing was good. Carriers Equipment was inadequate. Mutual's and Midwest's need for more trucks and trailers became acute. They procured Hayden

to purchase equipments for them in his name, Mutual making the down payments. Mutual and Midwest paid rentals to Carriers Equipment when equipment was used. These rentals liquidated subsequent installment payments. Hayden then agreed to manage these purchased units of truck and trailer which, under the Illinois law, had to be licensed as a unit. He hired and fired drivers, paid social security demands and other charges. He was reimbursed therefor by Mutual. Hayden received $5.00 per month for such services per unit. From November 8, 1940, to December 31, 1941, 238 tractors were purchased and operated in this fashion. Hayden then declined to further obligate himself individually. On January 1, 1942, Hayden Truck Lines, Incorporated, an Illinois corporation, was incorporated. It took over and carried on Hayden's individual service to Mutual and Midwest. More equipment was acquired by Hayden Truck Lines on Mutual's behest and its and Midwest's behalf.

Under this partial statement of the facts the question comes: Were Mutual and Midwest, during the audit period, contract haulers or were they engaged in interstate commerce as common carriers of freight for the public generally? If they were the former they are amenable to the payment of sales tax on equipment purchased. Two facts are confessed by appellants to be true. First, prior to November 5, 1940, that Mutual and Midwest were contract carriers. Second, remembering that the audit period commenced January 1, 1939, it is conceded that Mutual purchased 50 trailers through Carrier Equipment on or about April 13, 1939, and that thereafter more trailers were purchased for Mutual and Midwest by Carriers Equipment prior to November 5, 1940.

As a general proposition it should be stated at this time that the Board of Tax Appeals is of the opinion that the word *directly*, as used in the exemption sections of the Ohio Sales and Use Tax Laws, has a limited meaning and that in the case of a Public utility engaged in the hauling of freight as a common carrier, only those trucks, tractors and trailers actually used to haul the freight involved are entitled to exemption; and that the only tires, oils, parts, etc. entitled to the exemption are those used on the vehicles

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hauling the freight and actually necessary or required by law for the operation and movement of such vehicles. All other vehicles and items of equipment purchased for the convenience of the utility, although advantageous in the general operation of its business, are used indirectly in the rendition of a public utility service and are subject to the tax. To place any other interpretation on these exemption sections would be to nullify the use by the legislature of the word *directly*. See, also, Roadway Express, Inc., vs. Tax Commissioner, Board of Tax Appeals' entry No. 12351 dated September 5, 1947.

And now concerning ourselves with the purchase of tractors and trailers after November 5, 1940, it is observed that in accordance with the last paragraph of General Code section 5546-2, "it shall be presumed that all sales made in this state are subject to the tax hereby levied until the contrary is established." Has the contrary been established? How can the contrary be established? It is an elemental rule of taxation that states may not, by sales and use taxes, tax tangible property which is to be used and consumed in interstate commerce. Federal authority for that position hardly requires recitation. Ohio recognizes certain exemptions. General Code section 5546-2 provides in part that "the tax hereby levied does not apply to the following sales:" Subsection thereof reads: "Sales which are not within the taxing power of this state under the constitution of the United States." Again in General Code section 5546-1 it recognized and prescribed that: "Retail sale' and 'sales at retail' include all sales excepting those in which the purpose of the consumer is • • • to use or consume the thing transferred • • • directly in the rendition of a public utility service • • •." If Mutual and Midwest have made proof of the fact that they are common carriers of freight for the public generally, that they are rendering a public utility service in interstate commerce, and that the equipment purchased and here assessed for taxation was purchased and used *directly* in the rendition of a public utility service, then the presumption has been controverted and the "contrary established."

Examining the facts in issue, it becomes clear that Carriers Equipment, T. G. Hayden and Hayden Corporation

were but straw men set up in a perfectly legal manner to take title to equipment, procure its registration, ostensibly manage it, to conceal their 1940 change of policy. This Board is not a court of equity. If it were it might be that it would frown upon Carriers, Hayden and Hayden Corporation, being one thing to all men and directly the opposite to the taxing authority of the State of Ohio. This quasi judicial tribunal may, as may the Tax Commissioner, be concerned only with the law applicable to the operative facts. These holding and operation mediaries, however, held nothing more than bare legal titles. The equitable or true ownership was in Mutual and Midwest. It was they who actually made the purchases and paid the down payments and deferred installment. Ownership, invoices, title registration are not conclusive evidence of taxable purchases and sales, nor are they conclusive evidence of tax exempt purchases and sales. The true test of exemption in this case must be and is found in the words of the statute in whether "the purpose of the consumer is • • • to use or consume the thing transferred • • • *directly* in the rendition of a public utility service", or in interstate commerce. If the test is met by uncontradicted evidence, the presumption created is disspelled by establishment of the contrary. The evidence is conclusive, and the fact admitted, that 10% of Midwest's and Mutual's business arose from sources outside of Universal's creation; that they accepted and hauled car load freight for general public shippers, and that they solicited such business. Federal authorities have repeatedly recognized that "freight forwarders", who engage in the collection and delivery of freight by the use of their own equipment, are public utilities engaged in interstate commerce. Why should this not be so? They publish tariffs and rates, solicit business from the general public, they pick up freight, cart it to its docks, sort and car it, re-sort it at distributing docks and forward it on to consignees and deliver it to consignees at points of delivery. It operates under concurrences which have governmental sanction. Such is the position of Universal. Mutual and Midwest are the intermediate forwarding agents, the connecting carriers, in that chain of freight movement in interstate business. It is, therefore, the finding of this Board that the Tax Com-

missioner erred in assessing the appellants on sales of stock made to Mutual and Midwest after November 5, 1940. They come within the statutory exceptions and are exempt from taxation.

We come now to a consideration of the use and storage tax in the amount of $18,182.08 imposed on appellants over the audit period. Included in this assessment is the use tax assessment made on the trailers purchased prior to November 5, 1940. Without recitation of the use and storage statutes, suffice it to say that they are drawn in almost identical language with that of the sales tax statutes. See General Code sections 5546-25 and 5546-26. The use tax assessment here in question is divisible into two parts. $258.95 was assessed on the out of state purchase of fire extinguishers, garage items, safety buttons, pay roll binders, pencils, dictaphones, etc. $18,923.13 was assessed on the out of state purchases of tractors and trailers, including the trailers purchased prior to 1940. In regard to the $258.95 assessment, the evidence indicates that these items were used in Ohio and were not used directly in the rendition of a public utility service and the assessment was, therefore, legally made. In regard to the $18,923.13 assessment, the evidence establishes that this assessment was made on the purchase of trucks, tractors, and trailers which we used in Ohio. The Board holds that all this rolling stock purchased after November 5, 1940, was used directly in the rendition of a public utility service and in interstate commerce and is not subject to the Ohio use tax, but that all the items purchased prior to November 5, 1940, not being so used, are subject to the tax.

The segment of the sales tax assessment included in this appeal in the amount of $10,148.97 is for the purchase of trucks, tractors and trailers in Ohio for the period November 5, 1940, to December 31, 1941. As above stated, the Board holds that the purchase of all rolling stock used directly in the rendition of a public utility service or actually used to haul freight in interstate commerce is exempt from the operation of the Sales Tax Act and, therefore, this portion of the sales tax assessment would not have been made.

The segment of the sales tax assessment in the amount of $477.51 is for the purchase of 7 passenger automobiles and 3 pick up trucks. That portion of the tax assessed on the

purchase of the passenger automobiles is admitted by appellants to be correct. The pick up trucks were used to bring repair parts to garages where the equipment of independent contractors was being repaired. They were also being used for delivering tires and tubes to the equipment of independent contractors broken down on the road. These pick up trucks were not hauling any freight for the public and they could not be said to be used directly in the rendition of a public utility service and they were not engaged in hauling freight in interstate commerce. Their purchase was clearly subject to the Sales Tax Law.

The segment of the sales tax assessment in the amount of $411.17 appears to be made on the purchase of oil, parts, and drivers' log books by Hayden drivers in Ohio; and these purchases, being made by a contract hauler, are taxable.

The sales tax assessment of $18,260.86 covers small items of equipment sold to Mutual's and Midwest's independent contract haulers. This assessment was properly made. The evidence establishes that Mutual owned and operated a garage at Chicago, which did 90% of its business. It, with Midwest, until November 30, 1940, owned and operated a garage at Monroeville. A bunk house was maintained out of necessity at the latter place for convenience of contract carrier drivers. Repair work was done for owner operators at cost plus 5 to 10%. We quote the following from appellants' brief: "All parts purchased for use in the garage went immediately into equipment which was used in and for a public utility purpose. They were resold by Mutual and Midwest directly to the independent contractors for use in maintaining and operating the equipment in a public utility service."

Mutual's purchase of the 50 trailers was made when it was a contract carrier. Mutual's and Midwest's purchases and sales of equipment were made by them while having the status of a public utility to independent contractors. In both instances, however, these trailers and equipment played a part in the moving of interstate freight. In the entry filed by this Board in Breuer, Inc. v. Evatt, No. 7176 under date of January 15, 1945, it is aptly pointed out that:

> "A private motor carrier is not classified as a public utility in Sec. 614-1 et seq. relating to the regula-

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tion of public utilities, is expressly excluded from the definition contained in Sec. 614-84 of motor transportation companies which serve the public generally and is classified separately as a private motor carrier in Sec. 614-103 et seq. Neither is it included in the definition of a public utility in G. C. Sec. 5415 and 5416 relating to taxation. It must be assumed, therefore, that the term 'public utility service' as used in Sections 5546-1 and 5546-25 has its ordinary meaning, namely, service rendered to the public generally, and not service which is limited to those persons with whom the carrier chooses to contract."

Under the Ohio law as therein set forth, it is apparent that Mutual, prior to November 5, 1940, was not a public utility, but a private motor carrier hauling freight with whom it chose to contract. It was not then rendering a public utility service. The equipment was not intended to be used and consumed directly in public utility service. At any time Mutual might have discontinued its contract service with Universal and engaged in intrastate private cartage.

Concerning this assessment of $18,260.86 made on small items purchased by Mutual and Midwest and thereafter sold to their contract haulers in Ohio, it is concluded that Mutual and Midwest were duty bound to have collected sales tax from them for and on behalf of the State. Due to insufficient record evidence, it must be presumed that these sales occurred within the State. Mere denial and assertion that a majority of these sales occurred without Ohio, without the offering of proof contra, is insufficient to counterbalance or overcome the statutory presumption which attends the action of the taxing authorities in making such assessment. No proof is made that such a tax has been paid elsewhere or that this or that sale was made outside of Ohio. This conclusion is also subject to the qualification: Were such sales and purchases within the taxing power of the State?

Appellants contend that the tax assessed is directly upon instrumentalities used in interstate commerce and contra

to the commerce clause of the Federal Constitution. We are cited to a number of authorities which hold that a state may not place such a burden on interstate commerce. One of such is Helson v. Kentucky, 279 U. S., 245, where the state sought to tax motor fuel used in a ferry. Justice Sutherland, in the course of the Court's opinion, states:

> "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce."

Bingaman v. Golden Eagle Western Lines, 297 U. S., 626, a second case urged upon us, is another attempt to tax gasoline. It has the additional feature of a license requirement. This board holds the view that these cases are factually distinguishable from the facts herein encountered. Motor equipment without fuel is completely hamstrung. It is as important as the engine using it. One without the other is valueless in transportation. Requirements imposed on interstate transportation beyond that required of the general public are discriminatory. Such are not only burdensome, but may become prohibitory. Is the Ohio Sales Tax Law of such character? We think not. It imposes the same tax generally. Intrastate transportation bears the same burden. It is in the nature of a replacement tax, if that term may be employed, imposed on all purchases of motor vehicle parts. Its imposition creates no discriminatory burden. Neither does it regulate or attempt to regulate interstate commerce.

The more recent case of Western Live Stock v. Bureau of Revenue, 303 U. S., 250, 82 L. Ed., 823, makes this pronouncement in its fourth syllabus:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens even though it increases the cost of doing the interstate business."

The Ohio law proposes to tax only sales made in Ohio. No other state attempts to tax sales made without its bor-

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ders. Western Live Stock case, supra, further has this to say in its fifth syllabus:

> "State taxation is unconstitutional where it places on interstate commerce burdens of such a nature as to be capable, in point of substance, of being imposed with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce, the effect of which would be to destroy interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

And later still it is held in McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S., 33, 84, L. Ed. 565, in the second and third syllabi, that:

> "State taxes whose tendency is to prohibit interstate commerce or place it at a disadvantage as compared or in competition with intrastate commerce, or which discriminate against interstate commerce, are unconstitutional."
>
> "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing business by them."

See further, the annotation appearing in 128 A. L. R., 900.

One additional point made by the appellants deserves comment. With respect to the taxability of certain rolling stock purchased after November 5, 1940, in Detroit and drawn to Toledo, it was held that this property had acquired a situs in Ohio and, hence, it was properly taxable because of "storage" in Ohio. It is the Board's judgment that the tax commissioner erred in determining that, as a matter of fact, these vehicles were so stored and, hence, subject to "storage" taxes.

These motor vehicles had but a temporary stoppage in Toledo for the purpose of lettering, installing equipment prescribed by underwriters, and installing fifth wheels that thereby those vehicles were usable for the hauling of freight. After these things were done the vehicles were deadheaded to Chicago and there licensed and placed in service.

The Court of Appeals of the Ninth District, speaking through Judge Washburn, says in United Mills Co. v. Tax Commission of Ohio, 54 O. S., 1:

> "If the purpose (of the interruption) is solely to serve some necessity or convenience * * * and the interruption is not indefinite but reasonable, continuity of movement is not broken * * *".

Appellee attempts to justify the Tax Commissioner's blanket assessment by saying that it is no concern of his if the appellants commingled their business in order to deceive independent contractors, confuse the unions, and promote their business interests. It is said that all are one for the purpose of assessing and collecting sales and use taxes, which is to say that separate entities are to be disregarded. Appellants, of course, assert the contrary. Altho the business policy and unification and management of Mutual and Midwest interests and property was partially done with a purpose to deceive, this Board cannot find from the evidence that they attempted to perpetrate a fraud against the State of Ohio or that they committed an illegal act. As we view the situation presented by the evidence, the entity of Carriers Equipment, Hayden and Hayden Truck Lines cannot be brushed aside. We see no need for so doing. It is rather a question of agency and not entity. The evidence is all to the effect that Carriers, Hayden and Hayden Truck acted as agents for Mutual and Midwest, who made the down payments, used and paid for the equipment and actually owned it and enjoyed it in common. The Tax Commissioner is correct in his view that Mutual and Midwest created the confusion—of which they now complain—by their joint purchase, use and ownership. They are the only parties who can separate these matters if the same

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are separable. The confusion they created cannot be used as a shield to withhold that from the State to which it is justly entitled.

It is, therefore, by the Board of Tax Appeals considered and ordered that the assessment herein complained of be modified in conformity with the views outlined and opinions expressed in this entry; and for this purpose this cause is remanded to the Tax Commissioner to the end that that official issue a corrected assessment as outlined above.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

MANUEL KOSLEN,
Secretary.

APPENDIX "B"

MIDWEST HAULERS, INC., et al., *Appellants,*

v.

GLANDER, Tax Commr., et al., *Appellees*

Taxation—Sales and use tax assessment—Interstate commerce not immune from taxation by state—Assessment not invalid as burden on interstate commerce, when—Motor transportation companies—Sale and use of tangible property of contract carrier, taxable—Common carrier rendering public utility service, excepted—Convenient or facilitative items used in business, not excluded—Joint assessment against owning, holding and operating companies—Sections 5546-1, 5546-2 and 5546-26, General Code.

(No. 31240—Decided December 8, 1948)

Appeal from the Board of Tax Appeals

This case is in this court on appeal by Midwest Haulers, Inc., Mutual Trucking Company, Carriers Equipment Company and Hayden Truck Lines, Inc., and the cross-appeal by C. Emory Glander, Tax Commissioner of Ohio, from the

decision of the Board of Tax Appeals modifying a sales and use tax assessment, levied by the Tax Commissioner against the appellants, and remanding the cause to such commissioner.

Midwest Haulers, Inc., was incorporated under Ohio laws in 1931 and Mutual Trucking Company was incorporated under Illinois laws in 1935. During the period from the beginning of the audit period on January 1, 1939, to November 1940, they operated under the independent contract system. In 1940, Midwest and Mutual acquired equipment of their own, but instead of purchasing the equipment and taking title thereto in their own names, they, acting together, organized Carriers Equipment Company under Ohio laws to act as a holding company for the equipment purchased. Mutual made the down payment for such equipment and the remaining part of the purchase price was paid by rental payments to Carriers Equipment Company.

Also, Midwest and Mutual made arrangements with one T. G. Hayden, later organized as Hayden Truck Lines, Inc., whereby with Mutual's money Hayden Truck Lines, Inc., purchased the needed equipment and supervised and operated it for Midwest and Mutual. In return for this service Hayden Truck Lines, Inc., received $5 per month for each unit.

The Tax Commissioner made an audit of the appellant companies, covering the period from January 1, 1939, to December 31, 1943, and levied a tax assessment against them jointly upon the sale and use of tangible personal property, consisting mostly of tractors, trailers, trucks, automobiles, tires, tubes, automobile parts, oil, grease, etc.

An appeal was taken by appellants to the Board of Tax Appeals based largely on the provisions of Section 5546-1, General Code, which reads in part as follows:

"'Retail sale' and 'sales at retail' include all sales excepting those in which the purpose of the consumer is * * * directly in making retail sales or directly in the rendition of a public utility service * * *."

The Board of Tax Appeals found from the evidence and admissions of the parties that until November 5, 1940, Mid-

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west and Mutual were contract carriers, not rendering a public utility service; that the sale and use of rolling stock before that time were subject to tax; that after November 5, 1940, Midwest and Mutual were operating as common carriers, thus rendering a public utility service; and that the sale and use of such stock after such date were not subject to tax. The board found further that certain garage items and other tangible personal property were not used directly in rendering a public utility service, and the sale and use of such items were, therefore, not excluded from taxation; and that Carriers Equipment Company and Hayden Truck Lines, Inc., were the agents of Midwest and Mutual. The board modified the assessment made by the Tax Commissioner.

Messrs. Benoy & Sebastian, for appellants.

Mr. Hugh S. Jenkins, attorney general, and *Mr. Joseph S. Gill,* for appellee Tax Commissioner.

By the Court. We must first determine the question whether the state of Ohio had the power to impose taxes on the sale and use of the items of tangible personal property in question. Most of the items involved in the assessment were trucks, trailers, tires and parts consumed in connection with their operation, and Midwest and Mutual did operate in interstate commerce.

That a state may not impose a tax which is a burden on interstate commerce is an established principle of law. The General Assembly recognized this in providing in Section 5546-2, General Code, that "the tax hereby levied does not apply to the following sales: • • •

"8. Sales which are not within the taxing power of this state under the Constitution of the United States."

There is a similar provision in Section 5546-26, General Code, pertaining to the use tax.

It does not follow, however, that interstate commerce is immune from taxation by a state. The Supreme Court of the United States, in interpreting the commerce clause of the federal Constitution, in the case of *Western Live Stock* v. *Bureau of Revenue,* 303 U. S., 250, 82 L. Ed., 823, 58 S. Ct.,

546, 115 A. L. R., 944, stated in the fourth paragraph of the headnotes:

"The commerce clause does not relieve those engaged in interstate commerce from their just share of the state tax burden even though the cost of doing the business be thereby increased." See, also, 51 American Jurisprudence, 262, Section 203.

The sales and use taxes involved in the instant case are nondiscriminatory and do not have a tendency to prohibit interstate commerce; they are not levied on interstate commerce at all but affect such commerce only incidentally and are levied without discrimination against interstate and intrastate commerce. Only such sales as are made within the state are taxed, and not those sales outside its borders. In our opinion the tax assessment as modified by the Board of Tax Appeals does not constitute such a burden on interstate commerce as to render the assessment invalid under the Constitution of the United States.

The next question raised is whether the decision of the Board of Tax Appeals is unreasonable or unlawful in holding that Midwest and Mutual were not rendering a public utility service prior to November 5, 1940, and that subsequent to that time they were rendering such a service.

As its name indicates, the term, "public service," implies a public use and service to the public, and the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public which has a legal right to demand and receive the utility's services or commodities. 43 American Jurisprudence, 571, Section 2.

The transportation of goods by motor vehicle is a business which has been found so related to the public interest and welfare as to require special regulation and control. See Section 614-84 *et seq.*, General Code. When a company is authorized to act as a common carrier and holds itself out as willing to serve the general public and, in fact, does serve such public, it is engaged in rendering a public utility service within the contemplation of the sales and use tax laws. Sections 5546-1 and 5546-25, General Code.

Although it is true that Midwest and Mutual could have at any time acted as common carriers, the Board of Tax

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Appeals determined that until November 5, 1940, they operated as contract carriers and were not during that period rendering a public utility service. The authorization to act as a common carrier does not in and of itself conclusively establish that there is such operation. The actual operation of a business determines its legal status, and, although Midwest and Mutual were authorized to act as common carriers, they did not in fact so operate but instead acted as contract carriers. Therefore, the decision of the Board of Tax Appeals in holding that Midwest and Mutual were not rendering a public utility service up until November 5, 1940, and were rendering such service thereafter was neither unreasonable nor unlawful.

Was the decision of the Board of Tax Appeals unreasonable or unlawful in holding the sale and use of certain items of tangible personal property taxable and not excluded under the provisions of Sections 5546-1 and 5546-25, General Code? Its decision was based on the ground that such items were not used *directly* in rendering a public utility service within the meaning of the provisions of the sales and use tax laws for exception. In the case of *Fyr-Fyter* v. *Glander, Tax Commr.*, 150 Ohio St., 118, 80 N. E. (2d), 776, this court had occasion to construe the word, "directly," as used in Sections 5546-1 and 5546-25, General Code, in regard to the business of "mining." Paragraph one of the syllabus of that case is as follows:

"The exception in the definition of 'retail sale' and 'sales at retail' in Section 5546-1, General Code (a part of the Sales Tax Act), and in the definition of 'use' in Section 5546-25, General Code (a part of the Use Tax Act), of such sales or use of tangible personal property to be used or consumed 'directly in the production of tangible personal property for sale by * * * mining' includes the sale or use of only those items which are indispensable in mining and does not include items which are merely convenient or facilitative."

None of the items the sale and use of which were held taxable in the instant case was indispensable in rendering a public utility service. It is true that the items were used in the business, but their use was merely convenient or facilitative, and being such were not entitled to be excluded from

taxation under the provisions of Sections 5546-1 and 5546-25, General Code.

The final question to be determined is the matter of the separation of the assessment against the appellants. The Board of Tax Appeals found, and the evidence supports its finding, that Carriers Equipment Company and Hayden Truck Lines, Inc., were the agents of Midwest Haulers, Inc., and Mutual Trucking Company, for the purpose of purchasing and holding equipment for Midwest and Mutual, and in our opinion the sales and use tax assessments were properly assessed against these appellants jointly.

It is the function of this court on appeal pursuant to Section 5611-2, General Code, to determine as a matter of law whether the Board of Tax Appeals acted unreasonably or unlawfully in its decision, that is to determine whether the correct principles of law were applied in a reasonable manner.

In our opinion the decision of the Board of Tax Appeals in this case is neither unreasonable nor unlawful and is affirmed.

Decision affirmed.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, SOHNGEN and STEWART, JJ., concur.

TURNER, J., not participating.

Supreme Court of the United States

OCTOBER TERM, 1948.

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, CARRIERS EQUIPMENT COMPANY, HAYDEN TRUCK LINES, INC.,

Appellants,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,

Appellee.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS APPEAL.

The appellee, C. Emory Glander, Tax Commissioner of Ohio, has filed a motion to dismiss this appeal. His stated basis of the motion is "that the validity of statutes of the state of Ohio was not drawn into question in the Supreme Court of Ohio, the court from which this alleged appeal is taken."

A reading of the decision of the Supreme Court of Ohio shows that the statement of the appellee is wholly incorrect. The Supreme Court of Ohio said:

> "We must first determine the question whether the state of Ohio had the power to impose taxes on the sale and use of the items of tangible personal property in question. Most of the items involved in the assessment were trucks, trailers, tires and parts consumed in connection with their operation, and Midwest and Mutual did operate in interstate commerce.
>
> That a state may not impose a tax which is a burden on interstate commerce is an established principle of law. The General Assembly recognized this in providing in Section 5546-2, General Code, that 'the tax hereby levied does not apply to the following sales: * * *
>
> '8. Sales which are not within the taxing power of this state under the Constitution of the United States.'
>
> There is a similar provision in Section 5546-26, General Code, pertaining to the use tax.
>
> It does not follow, however, that interstate commerce is immune from taxation by a state. The Supreme Court of the United States, in interpreting the commerce clause of the federal Constitution, in the case of **Western Live Stock v. Bureau of Revenue**, 303 U. S., 250, 82 L. Ed., 823, 58 S. Ct., 546, 115 A. L. R., 944, stated in the fourth paragraph of the headnotes:
>
> 'The commerce clause does not relieve those engaged in interstate commerce from their just share of the state tax burden, even though the cost of doing the business be thereby increased.' See, also, 51 American Jurisprudence, 262, Section 203.
>
> The sales and use taxes involved in the instant case are nondiscriminatory and do not have a tendency to prohibit interstate commerce; they are not levied on interstate commerce at all but affect such commerce only incidentally and are levied without

discrimination against interstate and intrastate commerce. Only such sales as are made within the state are taxed, and not those sales outside its borders. In our opinion the tax assessment as modified by the Board of Tax Appeals does not constitute such a burden on interstate commerce as to render the assessment invalid under the Constitution of the United States."

150 O. S., 402 at pages 404 and 405.

On the face of the opinion of the Supreme Court of Ohio, the jurisdiction on appeal to this court is apparent. As held in the case of **Charleston Federal Savings and Loan Association v. Alderson**, 324 U. S., 182:

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." (Op., p. 861.)

That is exactly the situation which exists in this case. Exactly in point is the case of **Central Greyhound Lines, Inc., v. Mealey**, 68 Supreme Court Reporter, 1260, 334 U. S., 653:

"The state urges that the constitutional claims here pressed by the appellant were not passed upon by the New York Court of Appeals. The record does not sustain this challenge to our jurisdiction. The constitutional issues were undeniably raised before the state Tax Commission and on review before the appellate division of the Supreme Court, 266 App. Div. 648, 44 NYS2d 652. The suggestion that these issues were not before the Court of Appeals is based on its statement that the question urged there was 'not one of constitutional taxing

power but of statutory construction.' 296 NY 18, 24, 68 NE2d 855. But the court proceeded to pass upon the constitutional issues and expressly held that 'there is no constitutional objection to taxation of total receipts here. This is not interstate commerce. * * *' 296 NY at 25, 68 NE2d 855. Its amended remittitur stated explicitly that a question arising under the commerce clause of the Constitution 'was presented and passed upon,' and that in sustaining the tax the court 'held that the aforesaid statute as so construed is not repugnant to that provision of the federal Constitution.' This amendment was not a retrospective injection of a nonexistent federal question, but a formal certification that a federal claim had been presented and was adjudicated by the Court of Appeals. It is properly here for review. Section 237 (a) of the Judicial Code, 28 USCA, §344 (a). 8 FCA title 28, §344 (a)."

These authorities show beyond any question that this court has jurisdiction on appeal under the circumstances of this case.

This appeal involves the affirmance by the Supreme Court of Ohio of an order of the Board of Tax Appeals, an administrative tribunal. This court has jurisdiction on appeal in such cases.

Sultan Railway and Timber Co. v. Department of Labor and Industries, 277 U. S., 135.

The language of Chief Justice Taft in **Truax v. Corrigan**, 257 U. S., 312, is directly applicable to this case.

"In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go be-

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hind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. **Kansas City Southern Ry. Co. v. Albers Commission Co.**, 223 U. S., 573, 591, 593; **Cedar Rapids Gas Light Co. v. Cedar Rapids**, 223 U. S., 655, 668; **Southern Pacific Co. v. Schuyler**, 227 U. S., 601, 611." (Op., pp. 324, 325.)

As stated by this court in **Southern Pacific Company v. Arizona**, 324 U. S., 761:

> "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, **this court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.**"

CASES CITED BY APPELLEE NOT IN POINT.

The cases cited by appellee are not applicable to this appeal. The case of **Eustis v. Bolles**, 150 U. S., 362, was decided on the point that the decision of the Supreme Court was sufficient to sustain the judgment notwithstanding the federal question. That is not true in the instant case.

Stadelman v. Miner, 246 U. S., 544, held that a claim of denial of due process would merely challenge the power of the state court to proceed to a decision and did not draw in question the validity of a statute of the state. The instant case presents an entirely different situation.

Jett Bros. v. The City of Carrollton, 252 U. S., 1, was a case wherein the appellant taxpayer had failed to

exercise his rights under the state statutes to correct the claimed excessive or unfair valuation of his property. Under these facts this court held that no question of the validity of a statute had been raised. The instant case does not present a comparable situation.

The case of **Zucht v. King**, 260 U. S., 174, involved a question of the validity of an ordinance requiring vaccination of all school children. This court dismissed the appeal for the reason that it had theretofore decided that compulsory vaccination was within the police power of a state. The validity of a vaccination ordinance is a far cry from the question involved in the present appeal.

Honeyman v. Hannan, 302 U. S., 375, involved merely the question by what process legal rights may be asserted and legal obligations enforced. This court held:

> "The federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced **provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided.**" (Emphasis ours.)

If this case has any relation to the issues of the instant appeal it is favorable to the appellants. The appellants did not have a "fair opportunity to be heard" in that the uncontradicted evidence was wholly ignored by the Board of Tax Appeals of the state of Ohio and the Supreme Court of Ohio.

The appellee also cites the case of **Memphis Natural Gas Company v. Beeler**, 315 U. S., 649, in which the appeal was dismissed but certiorari was granted. In that case the constitutionality of the statute under which the tax assessment was made was not drawn into question. As hereinbefore pointed out in the instant case, the Su-

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preme Court of Ohio specifically considered the constitutional question. The Memphis Natural Gas Company case therefore has no application to this appeal.

CONCLUSION.

Wherefore, we respectfully request the court to overrule the motion to dismiss for the reason that it is shown on the face of the record that this court has jurisdiction under Sec. 237, paragraph (a) of the Judicial Code, 28 U. S. C., 344 (a).

BENOY & SEBASTIAN,
A. M. SEBASTIAN,
Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 728

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, CARRIERS EQUIPMENT COMPANY, HAYDEN TRUCK LINES, INC.,

Appellants,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

Herbert S. Duffy,
Attorney General of Ohio;
W. H. Annat,
Assistant Attorney General of Ohio,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 728

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, CARRIERS EQUIPMENT COMPANY, HAYDEN TRUCK LINES, INC.,

Appellants,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,

Appellee

STATEMENT BY APPELLEE OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF ABOVE COURT, PURSUANT TO SUPREME COURT RULE 12.

The appellee states the following matters and grounds against the jurisdiction of this Court as asserted by the appellants herein, in their statement of the basis of the appellate jurisdiction, filed herein on the 7th day of March, 1949, as required by Rule 12 of the Supreme Court.

The statute relied on by appellants herein to sustain the appellate jurisdiction of this Court, *i.e.*, Section 237, Paragraph (a) of the Judicial Code, 28 U. S. C. 344(a), is not applicable to this case for the reason that the validity of

statutes of the State of Ohio was not drawn into question in the Supreme Court of Ohio, the court from which this alleged appeal is taken.

Discussion of Issues Decided in the Supreme Court of Ohio

Four issues were determined by the Supreme Court of Ohio in arriving at its judgment in this case.

1. It held that "only such sales as are made within the State are taxed and not those sales outside its borders."

2. It held that the Board of Tax Appeals had not acted unreasonably or unlawfully in determining that Midwest and Mutual were not rendering a public utility service prior to November 5, 1940, and that, subsequent to that time they were rendering such a service.

3. It held that the Board of Tax Appeals had not acted unreasonably or unlawfully in determining that the sale and use of certain items of tangible personal property were not excluded from taxability by the language of Sections 5546-1 and 5546-25, Ohio General Code.

4. It held that the evidence supported the finding of the Board of Tax Appeals that Carriers and Hayden Truck Lines, Inc. were agents of Midwest and Mutual and that the taxes were properly assessed against all appellants jointly.

With respect to issue No. 1, the statute, Section 5546-2, reads as follows:

"• • •

"The tax hereby levied does not apply to the following sales:

"• • •

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"8. Sales which are not within the taxing power of this State under the Constitution of the United States."

and Section 5546-26 reads in part as follows:

"The tax hereby levied does not apply to the storage, use, or consumption in this State of the following described tangible personal property, nor to the storage, use, or consumption in this State of tangible personal property purchased under the following described cricumstances:

" • • •

"2. Property, the storage, use, or other consumption of which this State is prohibited from taxing under the Constitution, or laws of the United States, or under the Constitution of this State. This exemption shall not exempt from the application of the tax herein imposed the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this State, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this State pending transfer from one conveyance to another shall be exempt from the excise tax imposed by this act and section 5546-2 of the General Code of Ohio."

The question before the Supreme Court of Ohio, then, was whether or not the Constitution or laws of the United States forbade the taxes which were assessed. The Court held that they were not so forbidden. Since the statute did not purport to tax where so forbidden, it is obvious that the validity of the State statutes was not and could not have been ruled upon.

Issue No. 2 arose by reason of the language of the statutes which exempted from sales and use taxes property used "directly in the rendition of a public utility service."

Sections 5546-1 and 5546-25, Ohio General Code. This was purely a question of whether or not the activities of appellants fell within the exempting clause. No contention has ever been made by appellants that the exempting clause was unconstitutional.

Issue No. 3 involved the interpretation of the word "directly" as used in the statutes referred to in the preceding paragraph. No contention has ever been made by appellants that the interpretation, adopted in *Fyr-Fyter* v. *Glander,* 150 O. S. 118, and followed here, made the exempting clause unconstitutional.

Issue No. 4 did not involve statutes in any way.

Errors Assigned by Appellants Before the Supreme Court of Ohio

In appealing from the Board of Tax Appeals to the Supreme Court of Ohio the appellants urged the following constitutional errors:

"• • •

"(10) In failing to find that the property so purchased and sold was used in interstate commerce and was not within the taxing power of the state of Ohio under the Constitution of the United States.

"(11) In applying the provisions of Section 5546-2, providing that

"'It shall be presumed that all sales made in this state are subject to the tax hereby levied, until the contrary is established.'

whereby, in so doing, notwithstanding evidence to the contrary, the Tax Commissioner and the Board of Tax Appeals denied to the appellants, and each of them, the constitutional rights guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

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"(12) In applying the provisions of Section 5546-26, providing that

"'It shall be presumed that tangible personal property purchased on or after January 1, 1936, by any person for delivery in this state is purchased for storage, use or other consumption in this state.'

whereby, in so doing, notwithstanding evidence to the contrary, the Tax Commissioner and the Board of Tax Appeals denied to the appellants, and each of them, the constitutional rights guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

"(13) The aforesaid quoted portions of Sections 5546-2 and 5546-26 are in contravention of the Fourteenth Amendment to the Constitution of the United States, and void."

Assignment No. 10 was considered by the Supreme Court of Ohio. This became the first issue decided which, as shown above, did not involve statutory validity as against a charge of unconstitutionality.

Assignments Nos. 11 and 12 show on their face that no substantial claim of statutory invalidity was asserted. The matter complained of was the error of the Board of Tax Appeals in disregarding the evidence.

Assignment No. 13 is the only contention made by appellants that statutes of the State of Ohio are constitutionally invalid, but it is really nothing more than a restatement of assignments Nos. 11 and 12 and is not substantial. Such statutory provision is a necessary administrative presumption. The appellants' complaint is as to its application in the light of the evidence and not as to its validity. The Supreme Court of Ohio was not required to pass upon such an imaginative assignment in order to dispose of the case properly.

Conclusion

The appellants concede that the ground for appeal is not based upon the validity of statutes of the State of Ohio but is rather based upon the administrative actions of the Tax Commissioner. In their typewritten jurisdictional statement they say (page 13):

> "The taxes assessed by the state of Ohio are violative of the commerce clause of the constitution."

and again, referring to "due process,"

> "The judgment is contrary to the indisputed facts."

Thus, no ground for appeal under 28 U. S. C. 344(a) is set forth by appellants.

In support of this contention the appellee cites the following cases:

Eustis v. *Bolles*, 150 U. S. 361;

Stadelman v. *Miner*, 246, U. S. 544;

Jett Brothers Distilling Company v. *City of Carrollton*, 252 U. S. 1;

Zucht v. *King*, 260 U. S. 174;

Honeyman v. *Hanan*, 302 U. S. 375;

Memphis Natural Gas Compauy v. *Beeler*, 315 U. S. 649.

Respectfully submitted,

HERBERT S. DUFFY,
Attorney General

W. H. ANNAT,
Assistant Attorney General,
Attorneys for Appellee.

Dated this 17th day of March, 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 728

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, CARRIERS EQUIPMENT COMPANY, HAYDEN TRUCK LINES, INC.,

Appellants,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS PURSUANT TO RULE 12, PARAGRAPH 3, RULES OF THE SUPREME COURT

Comes now S. Emory Glander, Tax Commissioner of Ohio, appellee herein, and moves this honorable court to dismiss the appellants' alleged appeal herein for the reason that the validity of statutes of the State of Ohio was not drawn into question in the Supreme Court of Ohio, the court from which this alleged appeal is taken.

HERBERT S. DUFFY,
Attorney General
W. H. ANNAT,
Assistant Attorney General,
Attorneys for Appellee.

Dated this 17th day of March, 1949.

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No. 728. MIDWEST HAULERS, INC. ET AL. *v.* GLANDER, TAX COMMISSIONER. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Arthur M. Sebastian* for appellants. *Herbert S. Duffy*, Attorney General of Ohio, and *W. H. Annat*, Assistant Attorney General, for appellee. Reported below: 150 Ohio St. 402, 83 N. E. 2d 53.